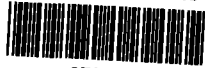




EPA Region 5 Records Ctr.



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U.S. Department of Justice

Environment and Natural Resources Division

BSG:AML
DJ No. 90-11-3-1620/2Environmental Enforcement Section
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September 16, 2002

VIA EMAIL, TELECOPY, AND REGULAR MAIL.
CONFIDENTIAL SETTLEMENT COMMUNICATIONGary Franke, Esq.
120 E. Fourth St.
Suite 560
Cincinnati, OH 45202Re: United States v. Aeronca, Inc. et al.
Civil Action No. 1:01 CV 00439
Settlement Discussion on September 13, 2002

Dear Gary:

I would like to summarize here the analysis I went through on Friday September 13, 2002, regarding settlement with the Dick Clarke entities. This letter is not meant as a substitute for the extensive explanations I gave on September 13, 2002; but rather, as a record of the basics of the analysis.

Multiplier

Based on the allocator's findings with respect to other companies that sent only construction and demolition debris, and based on the fact that I have "lost" some of the original 373,000 cubic yards of waste in reallocating for settlement purposes, the multiplier that is in effect with respect to solid waste is \$27.86. Using a corollary analysis, the multiplier that is in effect for liquid waste (which, as I indicated, is a "shorthand" for toxicity) is \$73.93. These "multipliers" reflect, inter alia, the fact that the 67% orphan share must be allocated among the PRPs, and the fact that a 40% premium is attached to any "cash out" PRP, that is, any PRP who did not join the Skinner Landfill Work Group.

Phase I – Thomas Clarke's Disposal of Solid Waste

The Skinner Log shows a total of \$717 being collected by the Skinners from Thomas Clarke for "dumping" by Thomas Clarke during 1956 through 1963. Making an assumption that is favorable to the Dick Clarke entities, I have assumed that the Skinners charged \$.50 per cubic yard for waste disposal during that time. Such an assumption results in a volumetric contribution of 1434 cubic yards to the Site. As I indicated, based on my view of the law and the facts, I have come to the conclusion that as between Clarke's Services, Inc. ("Clarke's Services"), and

Clarke's Incinerators, Inc., I have a greater chance of prevailing on a successor liability with Clarke's Services. Thus, I allocated 75% of 1434 cubic yards to Clarke's Services. This comes to 1075 cubic yards, or \$29,950.

Phase II – Thomas Clarke's Disposal of Cyanide Ash

Thomas Clarke's affidavit indicates that he had an arrangement to dispose of Ford's "cyanide chemicals" since the time of the opening of the Sharonville Plant (which was in 1958). Thus, he had an arrangement with Ford for six years at the time of his 1964 affidavit.¹ The Dent memo demonstrates that five 55 gallon drums containing cyanide ash were dumped "on top of the ground" at the Skinner Site in 1964.

I have made an assumption that the disposal of the cyanide waste did not happen just once per year, but rather, twice per year, resulting in the disposal of ten drums of cyanide waste per year, and sixty drums in six years. 60 x 55 gallons = 3300 gallons. Again, giving CSI 75% of this allocation, CSI gets 2475 gallons. At \$73.93, that amounts to \$182,976.

Phase III – Dick Clarke Company (1985 - 1990)

The documentary evidence for 1988 and 1989 (as set forth in Attachment A to my letter of September 12, 2002), demonstrates that the Dick Clarke Company sent 3780 cubic yards of waste to the Site. A 1985 Skinner Log entry for 9740 Cincinnati Dayton Road shows another \$50.00 disposal, which I assumed to constitute one 20 yard load and one 30 yard load. Thus, the total cubic yards of *documented* disposal by the Dick Clarke Company is 3830 cubic yards.

As I indicated on the telephone, however, the Skinner Log is notoriously incomplete. Moreover, numerous witnesses put "Dick Clarke" at the Site far more than the 179 loads that 3830 cubic yards represents. Being conservative, I increased the 3830 by 50%, to come to 5745 cubic yards. At \$27.86, that amounts to \$160,055.

Summary

I indicated that I would be willing to recommend to the appropriate authorities in EPA and DOJ a settlement in this case for \$373,981. I also indicated that I would listen to counteroffers; \$373,981 is not a final and fixed position. What I may not have indicated on the telephone, but what is obvious is that any settlement must be embodied in a Consent Decree that includes terms and conditions of the sort that the United States filed earlier in this action when we settled with Acme Wrecking, Sealy, and Hirschberg. Such Consent Decree provisions are standard.

¹ I recognize that the arrangement with Ford was by "purchase order." Ralph Dent's testimony made it clear that Ford used Thomas Clarke far more than anyone else.

Other Points

Without going into as many details as I did on the telephone, I would like to reiterate several points that I made on September 13, 2002. In light of the intense emotional reaction Dick Clarke has to this matter, these points need reiterating:

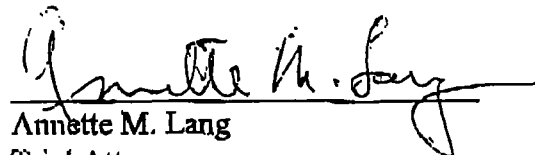
- (1) CERCLA is a strict liability statute. It has nothing to do with fault. It is not a "punitive" statute, and reimbursing the United States for the costs we have incurred under CERCLA is not a penalty. Things that were perfectly legal at the time they were done can and do result in CERCLA liability. Many, many of the major companies in this country and a good many smaller companies in this country have settled CERCLA cases; such settlements do not constitute an admission that these companies did "bad" things. If Mr. Clarke thinks of CERCLA as a "tax," that would be more appropriate than thinking of it as an admission that anything "wrong" was done. Many, many waste haulers in this country have settled under CERCLA.
- (2) Based on what you and your client said on the telephone on September 13, 2002, I am starting to believe that the allocator allocated direct liability to Clarke's Services between the period of 1967 and 1984. PLEASE NOTE: I HAVE NOT DONE SO. In my analysis, Clarke's Services has liability *only* as a successor to Thomas Clarke's business. Specifically, I credit the testimony of the Clarke's Services truck drivers that I deposed. I have not ignored that testimony at all.
- (3) Successor liability is something the Dick Clarke entities need to come to terms with. I have taken a lot of evidence about this issue, and I believe that I have a very strong case for successor liability. Your letter of September 9, 2002, did not address this aspect of my case at all.
- (4) The United States has settled its liability with other waste haulers that are similarly-situated to the Dick Clarke entities (e.g., King Wrecking and Acme Wrecking). The evidence of the contents of the disposals in those cases was weaker than the evidence against the Dick Clarke entities. Thus, in fairness to other similarly-situated transporters to the Skinner Site who have settled with the United States, the United States cannot settle this case for anywhere near the current offer of the Dick Clarke entities. (Furthermore, while the United States recognizes that Whitton was a significant hauler to the Site, to quote a famous saying, "you can't squeeze blood out of a turnip." The United States intends to settle with Whitton under our standard ability-to-pay policy.)
- (5) The United States now understands why the Dick Clarke entities did not settle for the sum the allocator attributed to them. However, if the settlement negotiations in the next couple of weeks do not result in a settlement, the United States will

have no cause for further forbearance. The United States is offering to settle this case based on a new volumetric allocation based on the evidence developed in this case. Arguments about unfair and differential treatment by the allocator no longer have any relevance. A failure by the Dick Clarke entities to settle will mean that the Dick Clarke entities seek a result in this case that is different from similarly-situated waste haulers who settled without burdening the United States with the expense and time of litigation.

- (6) Joint and several liability means serious exposure for the Dick Clarke entities and Dick Clarke himself. The United States has about \$5 million in unreimbursed costs. Even if the United States' chances for success in this case were 10% – and they are far greater than that – the Dick Clarke entities seriously should consider settling. The downside risk of not settling is extremely high. And, as I have indicated at least four times in the last month, if the Dick Clarke entities do not settle in the very near term, and this case goes on, the United States will be seeking far more than what we will settle for now. Barring an adverse judgment, the United States will not settle this case in the future for any amount that does not take into consideration the time value of money, the total amount of costs still outstanding, the efforts that the United States is going through now to get this settled on a basis that is equitable vis-a-vis other similarly-situated PRPs, and other relevant considerations. The United States will not make it worthwhile for the Dick Clarke entities to have avoided settlement now.

On a personal note, I do not look forward to pursuing the Dick Clarke entities for joint and several liability. I hope that they seriously think about the issues raised in the telephone call on September 13, 2002, and partly summarized in this letter.

Sincerely,


Annette M. Lang
Trial Attorney

cc: Mike O'Callaghan